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Testimony of:

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THE PRESIDENT'S POWER TO WAIVE THE IMMIGRATION LAWS

Introduction

I think it is important to explain that I favor increased immigration into the United States. Remember, if American Indians had strict immigration laws, none of us would be here.

People want to come here for the same reason that my parents, both immigrants, came here. This country is the land of opportunity and freedom. My parents did not know the language; they did not know the customs. They were strangers in a strange land. Years later, my mother told me that when she first arrived, she was a little girl well past the age of toilet training, but she was so excited her first night in the United States that she had an accident. When my father fought in WW II, he was proud that the Army used him as a spy because he spoke Italian like a native. When he was in his 90s, I recall one incident when I brought him to the VA hospital for a check-up. The doctor looked at his name and asked if he was Italian. He said no, he was an American. His mind had deteriorated by then. He did not know what year it was; he did not know who was President. Nevertheless, he knew that he was an American.

I favor reform along the lines that the President has proposed. Whether Congress enacts “comprehensive” immigration reform or whether it moves one-step at a time, the important thing is reform. The government tells us that there are over 11 million undocumented aliens. This country is not going to march 11 million people across our border. Democracies do not engage in mass deportations. I think we also agree that we have to secure our borders. If a 15-year old can cross our borders without papers, an al Qaeda operative can do the same.

Hence, the issue is not whether one agrees with the President's goals. (In fact, I share his goals.) The issue is whether it is constitutional for the President, unilaterally, to rewrite our

immigration laws and change the status of about 5 million people. The President's executive power does not give him the power to govern by decree. If the President can get away with this action, future Presidents will be able, for example, to rewrite other laws. For example, if the next President does not favor the Affordable Care Act, he or she can simply grant a waiver to all of that law.

Our Constitution rejected the notion that the President can govern by decree. President Obama did not base his decision on any theory that he was merely implementing Congressional intent. He did not argue that any legal precedent supported his actions. He did not even say that he was incorrect when he earlier said, repeatedly, that he does not have the legal authority to deal with undocumented aliens. Instead, the President, in his address to the nation, said that he acted and issued his order because "Congress has failed."¹

Congress does not fail when it refuses to enact a presidential proposal. If our Constitution were a computer program, we would not say that the separation of powers is a bug; instead, it is a feature of the program. The framers designed our Constitution to make it difficult to enact laws and to require compromise — all for protecting our liberty.

The Duty to "Faithfully Execute the Laws"

Article II provides that the President "shall take Care that the Laws be faithfully executed."² This clause is not a general grant of power. Rather, it reads like a restriction on Presidential power — an obligation imposed on the President to execute the laws faithfully, which is the way the Opinion Letters of the Office of Legal Counsel (OLC) have interpreted it — until now.

This case has remarkable similarities to *Youngstown Sheet & Tube Co. v. Sawyer*.³ There, the Court rejected the argument that the President's power to "faithfully execute" the laws gives him power to create law. The President issued an Executive Order instructing the Secretary of

¹ <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>

² U.S. Constitution, Art. II § 3. See, Steven G. Calabresi & Saikrishna Bangalore Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Gary Lawson & Christopher Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Saikrishna Bangalore Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701(2003); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEORGETOWN L. J. 1613 (2008).

³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

Commerce to seize steel mills, which were subject to a strike by the workers. The mill owners argued that the President's order amounted to lawmaking, a legislative function, but the Constitution gives that power to Congress and not to the President. The President said the steel strike would impair the manufacture of steel, which was necessary to prosecute the Korean War, and that in meeting this "grave emergency, the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief" of the Armed Forces.⁴

Like a statute, President Harry Truman's Executive Order explained in its preamble why he believed his seizure of the steel mills was necessary. Again, like a statute, his Order proclaimed rules of conduct that the affected persons must follow, and it authorized government officials to promulgate additional rules and regulations consistent with the Order. "The President's order did not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President."⁵ The Court could not sustain this Executive Order as an exercise of the President's power to execute faithfully the laws. The power to enforce the law is not the power to legislate.

President Obama's order and accompanying OLC Opinion also read like a statute, drawing lines that appear arbitrary. First, the President tells us:

This deal does not apply to anyone *who has come to this country recently*. It does not apply to anyone who might come to America illegally in the future. It does not grant citizenship, or the right to stay here permanently, or offer the same benefits that citizens receive – only Congress can do that. All we're saying is we're not going to deport you.⁶

He gives his reasons, as a statute gives its preamble. First, "Congress has failed."⁷ Second, he asked, "Are we a nation that accepts the cruelty of ripping children from their parents' arms? Or are we a nation that values families, and works together to keep them

⁴ 343 U.S. 579, 582, 72 S.Ct. 863, 864. *See also, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 712, 13 S.Ct. 1016, 1021, 37 L.Ed. 905 (1893): The Constitution "has made it his duty to take care that the laws be faithfully executed."

⁵ 343 U.S. 579, 582, 72 S.Ct. 863, 864.

⁶ <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> (emphasis added).

⁷ <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>

together?”⁸ Then he says *that we will accept this cruelty* and rip children from their parents’ arms *if* they came to this country illegally before the arbitrary date of January 1, 2010.⁹ Like a statute, he creates time limits, by granting benefits (permission to work; *i.e.*, a social security card¹⁰) only to those who arrived here *before* January 1, 2010.¹¹ The actual DHS new “policy” reads like a statute — it is six single-spaced pages, with sections, subsections, provisos, arbitrary dates, and the notice of the date when it is effective (January 5, 2015).¹²

In connection with the President’s announcement, his Office of Legal Counsel (“OLC”) has issued an Opinion¹³ that seeks to justify the Presidential action. The OLC Opinion is a fine example of result-oriented jurisprudence. The OLC titles its opinion, in part, “Authority to *Prioritize Removal* of Certain Aliens Unlawfully Present”¹⁴ but it never explains why assigning of social security cards has anything to do with setting priorities of deporting undocumented

⁸ <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>

⁹ <http://www.npr.org/blogs/thetwo-way/2014/11/20/365519963/obama-will-announce-relief-for-up-to-5-million-immigrants>

¹⁰ Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html> (“they will receive Social Security cards, officials said.”)

¹¹ By the way, the President’s rationale — “cruelty of ripping children from their parents’ arms” — raises cruelty problems of its own. The OLC Opinion states (at p. 2) that the President’s proposal “would not ‘legalize’ any aliens,” would only “remain in effect for three years, subject to renewal,” and “could be terminated at any time at DHS’s discretion”!

The President’s speech urges undocumented aliens to “come out of the shadows” while the OLC Opinion says that, once out of the shadows, the DHS, in its “discretion” can them deport them! This sounds like bait and switch.

¹² http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial-discretion.pdf (Nov. 20, 2014).

¹³ <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>

¹⁴ <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> (emphasis added).

aliens. It tries to argue that the President is implementing the law, but it never deals with the President's own justification: "Congress has failed."¹⁵

The OLC Opinion spins together a theory first, by interpreting historical incidents broadly and second, by reading much into selected segments of the immigration laws. However, only case law (not historical incidents) constitutes legal precedent. In any event, others have already distinguished those historical examples¹⁶ and I will not duplicate those comments here, except to note that they implemented Congressional policy; in contrast to President Obama, past Presidents did not issue their orders because "Congress has failed."¹⁷ That alone distinguished past examples.

We know that the President, over the years, has proposed immigration legislation similar to what he decreed in November 20, 2014, but Congress did not enact it. Congress did not authorize the President to issue social security cards to 5 million undocumented aliens but the President's order will do that.¹⁸ Congress has thus far not overhauled our immigration laws, but

¹⁵ <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>

¹⁶ See, e.g., Mark Krikorian, *Obama's Unprecedented Amnesty* (Nov. 18, 2014), <http://www.nationalreview.com/article/392887/obamas-unprecedented-amnesty-mark-krikorian>; Hans von Spakovsky & John G. Malcolm, *Obama's Unilateral Amnesty Really Will Be Unprecedented – and Unconstitutional* (Nov. 19, 2014), <http://dailysignal.com/2014/11/19/obamas-unilateral-amnesty-really-will-unprecedented-unconstitutional/>

However we interpret the prior historical examples, there is one major difference: in the present circumstances, President Obama does not rely on them; he does not say that he is cleaning up some unusual cases to implement Congressional intent, either express or implied. Instead, the President has said that he is issuing his Order because "Congress has failed." <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>

¹⁷ <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>

¹⁸ Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html> ("they will receive Social Security cards, officials said.").

— as the New York *Times* reported — “Obama, Daring Congress, Acts to Overhaul Immigration.”¹⁹

Even the OLC Opinion admits, “a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses ‘special risks’ that the agency has exceeded the bounds of its enforcement discretion.”²⁰ In fact, the OLC Opinion makes this point about “general policies” *seven times* in the course of its Opinion. It argues that the President’s new directive is not a general policy but it surely looks like one to its supporters and to anyone who reads it. As the New York *Times* reported, as noted in the prior paragraph, President Obama acted to “overhaul immigration.”

This state of affairs replicates *Youngstown Sheet & Tube Co. v. Sawyer*,²¹ where Justice Black said, for the Court, said that the President’ “seizure technique” to “prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes.”²² The *Youngstown* Court noted that the President had conducted seizures in the past, but pursuant to specific laws dealing with the particular seizures. In *Youngstown*, the President was not acting to implement a congressional statute because Congress refused to enact it.²³ So too, here, Congress has not enacted the President’s proposed statute.

As Justice Jackson, concurring, added, “When the President takes measures *incompatible with the expressed or implied will of Congress*, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the

¹⁹ Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html>.

²⁰ <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> at p. 7.

²¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

²² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586, 72 S. Ct. 863, 866, 96 L. Ed. 1153 (1952).

²³ “Congress had refused to adopt that method of settling labor disputes.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586, 72 S. Ct. 863, 866, 96 L. Ed. 1153 (1952).

matter.”²⁴ There certainly is no doubt that the President is acting contrary to, at the very least, the implied will of Congress. The President appears to concede that fact because he said that he is acting because he did not persuade Congress to enact his proposal (even when his party controlled both Houses of Congress). “Congress has failed.”²⁵

The President’s decree is valid only if he is acting pursuant to a power that the Constitution gives the President directly. Yet, when it comes to immigration matters, the Supreme Court has said, in *Galvan v. Press*,²⁶

In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that *the formulation of these policies is entrusted exclusively to Congress* has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.²⁷

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Galvan v. Press*?
NOTHING.

The *Youngstown* decision rejects any theory that the President can act because Congress refused to act. Similarly, it distinguishes cases where the President is acting to deal with an unforeseen emergency. As Justice Frankfurter concurring, said:

²⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 72 S. Ct. 863, 871, 96 L. Ed. 1153 (1952) (emphasis added). The OLC Opinion, at p. 6, acknowledges this principle:

“an agency’s enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. Cf. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”) [First emphasis added.]

²⁵ <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>

²⁶ *Galvan v. Press*, 347 U.S. 522, 531, 74 S. Ct. 737, 743, 98 L. Ed. 911 (1954).

²⁷ *Galvan v. Press*, 347 U.S. 522, 531, 74 S. Ct. 737, 743, 98 L. Ed. 911 (1954) (emphasis added)(internal citations omitted, citing *Kaoru Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 101, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1903); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49, 70 S.Ct. 445, 453, 94 L.Ed. 616 (1950).

We must therefore put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given.²⁸

Justice Black also made clear, “The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.”²⁹

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF THESE POINTS BY JUSTICES FRANKFURTER AND BLACK? NOTHING.

Repeatedly, over the last several years, the President has iterated and reiterated that he does not have the constitutional power to do what he has just done. As he said last year:

The problem is that I’m the president of the United States, I’m not the emperor of the United States. My job is to execute laws that are passed. And *Congress right now has not changed what I consider to be a broken immigration system.*³⁰

As the President said to Jose Diaz-Balart in an interview on *Telemundo*:

If we start broadening that [his protection to “Dreamers” — people who came to the United States as young children], then essentially *I’ll be ignoring the law in a way that I think would be very difficult to defend legally. So that’s not an option.*³¹

²⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 597, 72 S. Ct. 863, 890-91, 96 L. Ed. 1153 (1952).

²⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588, 72 S. Ct. 863, 867, 96 L. Ed. 1153 (1952).

³⁰ (emphasis added). See, <http://www.speaker.gov/general/22-times-president-obama-said-he-couldn-t-ignore-or-create-his-own-immigration-law> for the relevant quotations and citations.

³¹ Michael D. Shear, *For Obama, Executive Order on Immigration Would Be a Turnabout*, N.Y. TIMES, Nov. 17, 2014, <http://www.nytimes.com/2014/11/18/us/by-using-executive-order-on-immigration-obama-would-reverse-long-held-stance.html> (emphasis added).

**WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF THE PRESIDENT'S
REPEATED REPRESENTATIONS THAT HE CANNOT AND WILL NOT CHANGE THE
IMMIGRATION LAW WITHOUT GOING THROUGH CONGRESS? NOTHING.**

The principle of *Youngstown Sheet & Tube* extends beyond the facts of that case. Yet because we must not paint with too broad a brush, we must distinguish between the President who is legislating versus the President who is exercising delegated power.

First, there are times when the President may properly issue decrees that have the force of law. For example, Congress may provide that the certain things will (or will not) happen unless the President issues certain findings. In 1936, for example, the Supreme Court upheld a law that made it a crime to sell munitions to Bolivia (then engaged in an armed conflict) if the President made certain findings.³² Congress expressly delegated certain specific powers to the President. The President, rather than initiating legislation, was following the legislation.

In addition, the Constitution itself gives the President a few unilateral powers, such as the power to decide which foreign countries to recognize,³³ or the power to grant a Presidential pardon,³⁴ even *before* a trial or conviction.³⁵

The President can also refuse to prosecute someone criminally because the Constitution gives the Executive Branch absolute prosecutorial discretion not to prosecute. Cases going as far back as the Civil War have held that the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a criminal case.³⁶

³² *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216. 81 L.Ed. 255 (1936).

³³ U.S. Constitution, Art. II, §3. The courts derive this power from the brief reference in §3 providing that the President “shall receive Ambassadors and other public Ministers.” *E.g.*, *National City Bank of New York v. Republic of China*, 348 U.S. 356, 358, 75 S. Ct. 423, 99 L. Ed. 389 (1955): “The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court.”

³⁴ U.S. Constitution, Art. II, §2, cl. 1. *E.g.*, *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 8 L.Ed. 640 (1833).

³⁵ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380, 18 L.Ed. 366 (1867).

³⁶ *United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 3100, 41 L.Ed.2d 1039 (1974), citing *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 19 L.Ed. 196 (1869); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965), *cert. denied*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965).

The OLC Opinion uses the phrase, “*prosecutorial discretion*,” nine times! That is how important that concept is to its opinion. However, prosecutorial discretion relates to decisions not to enforce (or step up enforcement of) *criminal* laws.³⁷ Prosecutorial discretion is the decision whether or not to prosecute criminally. The President says he is using “prosecutorial discretion.” Granted, the President has the power not to prosecute someone criminally. He can also pardon for a federal criminal offense. However, distributing social security cards³⁸ and granting permission to work has nothing to do with prosecutorial discretion.

The Courts have long held, since *Flemming v. Nestor*,³⁹ that a deportation proceeding is *not* a criminal prosecution and deportation is not a criminal punishment. Deportation is a civil proceeding, not a criminal proceeding. The President can decide not to prosecute someone criminally even though that person has entered the country in violation of the criminal laws, for example, through immigration fraud. The President has that power as the Chief Law Enforcement Officer, but the President’s announcement of November 20th goes well beyond a decision to pardon someone for offenses. Prosecutorial discretion does not authorize the President to waive the provisions of civil law.

**WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Flemming v. Nestor*?
NOTHING.**

³⁷ In dictum, *Heckler v. Chaney* [discussed below] states, “This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” 470 U.S. at 831. However, the Court is not talking about a power of the agency. Instead, it is simply talking about standing — if the agency does not enforce through the civil process, no one may have standing to complain. In the very next sentence the Court makes that clear:

“This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.”

Heckler v. Chaney, 470 U.S. 821, 831, 105 S. Ct. 1649, 1655, 84 L. Ed. 2d 714 (1985).

³⁸ Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html> (“they will receive Social Security cards, officials said.”)

³⁹ E.g., *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 136, 74 L.Ed.2d 1435 (1960).

Indeed, the *ex post facto* clause does not apply to deportation because deportation is not criminal and the *ex post facto* clause only protects against *ex post facto* criminal laws, as the Court so ruled in *Galvan v. Press*.⁴⁰

**WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Galvan v. Press*?
NOTHING.**

Finally, the President need not enforce a law that he believes is unconstitutional.⁴¹ The President, as all executive, judicial, and legislative officers, both state and federal, take an oath to support the Constitution.⁴² In addition, our Constitution, pithy as it is, provides the language for this mandatory oath or affirmation. It requires the President, before he takes office, to swear or affirm that he will, to the best of his ability, “preserve, protect and defend the Constitution of the United States.”⁴³ The President’s duty to execute the laws faithfully includes the duty to execute the Constitution itself, the organic law, and prefer it to contrary statutory law.⁴⁴

The Framers understood this principle. During the Constitutional Convention, James Wilson, one of the drafters of the Constitution, said that the Courts, if they find a law “to be incompatible with the superior power of the Constitution, it is their duty to pronounce it *void*. . . . In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that *violates* the Constitution.”⁴⁵

Historical precedent supports this power. President Jefferson, for example, relied on his “oath to protect the constitution,” as justifying and requiring him not to enforce the Alien

⁴⁰ *Galvan v. Press*, 347 U.S. 522, 531, 74 S. Ct. 737, 743, 98 L. Ed. 911 (1954).

⁴¹ See discussion in, e.g., Saikrishna Bangalore Prakash, *The President's Duty to Disregard Unconstitutional Laws*, 96 GEORGETOWN L.J. 1613 (2008).

⁴² U.S. Constitution, Article VI, cl. 3.

⁴³ U.S. Constitution, Article II, §1. 8

⁴⁴ Senator Orin Hatch offers an extensive compilation and discussion of authorities, which he presented on the Senate floor. 151 Cong. Rec. S923-02, 151 Cong. Rec. S923-02, 2005 WL 264055 (Feb. 3, 2005).

⁴⁵ Statement of James Wilson on December 1, 1787 on the Adoption of the Federal Constitution, reprinted in 2 JONATHAN ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 445-46 (1836)(emphasis in original).

Sedition Act.⁴⁶ He believed he was obligated not to enforce a law that was “no law,” *i.e.*, an unconstitutional law.⁴⁷ Later, Chief Justice Chase adopted this view. How, he asked, “can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress sincerely believed by him to have been passed in violation of it?”⁴⁸

Various opinions of the Office of Legal Counsel (OLC) come to the same conclusion. The OLC is part of the Department of Justice. It is, in effect, the lawyer for the government. It issues Legal Opinions, on which courts sometimes rely. The OLC concluded that “the idea that the President has the authority to refuse to enforce a law which he believes is unconstitutional was familiar to the Framers. The Constitution qualifies the President's veto power in the legislative process, but it does not impose a similar qualification on his authority to take care that the laws are faithfully executed.”⁴⁹

The OLC has derived the Presidential power to refuse to enforce a law that he believes is unconstitutional from two clauses of the Constitution. One requires the President to “take Care that the Laws be faithfully executed,” and the other requires him to “preserve, protect and defend the Constitution of the United States.” The OLC agreed with Chief Justice Chase, who said in 1868, that the President's obligation to defend the Constitution authorizes him to decline to enforce statutes that he believes are unconstitutional.⁵⁰

The OLC, in response to inquiries from Congress in 1980, opined, “the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the

⁴⁶ See Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), reprinted in 1 THE ADAMS-JEFFERSON LETTERS 274, 275-76 (Lester J. Cappon ed., 1959).

⁴⁷ Letter from Thomas Jefferson to Edward Livingston (Nov. 1, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON 253-54 (Paul Leicester Ford ed., 1897).

⁴⁸ Letter from Chief Justice Chase to Gerrit Smith, Apr. 19, 1868, quoted in J. W. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 578 (1874) (Letter from Chief Justice Chase).

⁴⁹ Issues Raised by Section 102(c)(2) of H.R.3792, 14 Op. Off. Legal Counsel 37, 51, 1990 WL 488469, *10 (1990).

⁵⁰ Issues Raised by Section 102(c)(2) of H.R.3792, 14 Op. Off. Legal Counsel 37, 47-48, 1990 WL 488469, *9 (1990).

courts.”⁵¹ The President can also refuse to follow a law that he contends is unconstitutional even if that same President signed it into law.⁵² President may refuse to enforce the law before the Court makes its final decision.⁵³

Yet, the President’s view of the constitutionality of a law does not override the final judicial determination. The Office of Legal Counsel, in 1980 made that quite clear:

The President has no “dispensing power.” If he or his subordinates, acting at his direction, defy an Act of Congress, their action will be condemned if the Act is ultimately upheld. Their own views regarding the legality or desirability of the statute do not suspend its operation and do not immunize their conduct from

⁵¹ The Attorney Gen.'s Duty to Defend & Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 59, 1980 WL 20999, *4 (1980).

⁵² Issues Raised by Section 129 of Pub. L. No. 102-138 & Section 503 of Pub. L. No. 102-140, 16 Op. Off. Legal Counsel 18, at footnote 18, 1992 WL 479539 (1992):

The analysis of this question does not turn on the fact that the President has signed the two bills. As the Supreme Court has observed, “it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds.” *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983). That the President has signed a bill in no way estops him from later asserting the bill's unconstitutionality, in court or otherwise. See Letter for Peter W. Rodino, Jr., Chairman, House Committee on the Judiciary, from William French Smith, Attorney General at 3 (Feb. 22, 1985) (“Attorney General Smith Letter”) (“[T]he President's failure to veto a measure does not prevent him subsequently from challenging the Act in court, nor does presidential approval of an enactment cure constitutional defects.”).

⁵³ Issues Raised by Section 129 of Pub. L. No. 102-138 & Section 503 of Pub. L. No. 102-140, 16 Op. Off. Legal Counsel 18, at footnote 18, 1992 WL 479539 (1992), quoting an earlier Opinion:

Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel at 1 (Sept. 27, 1977) (“Harmon Memorandum”) (“[P]rior to a definitive judicial determination of the question of constitutionality a President may decline to enforce a portion of a statute if he believes it to be unconstitutional, even if he or one of his predecessors signed the statute into law.”)

*judicial control. They may not lawfully defy an Act of Congress if the Act is constitutional.*⁵⁴

This same Opinion also said:

[T]he 17th century dispute between Parliament and the Stuart kings over the so-called ‘dispensing power’ [is] directly relevant to the questions you have raised. The history of that dispute was well-known to the Framers of the Constitution, and it is clear that they intended to deny our President any discretionary power of the sort that the Stuarts claimed.⁵⁵

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF 4A U.S. Op. Office of Legal Counsel 55 (O.L.C.), 1980 WL 20999? NOTHING.

The President does not have *carte blanche* to refuse to enforce law that is constitutional. As the OLC earlier explained, in 1990, “Obviously,” the President cannot “refuse to enforce a statute he opposes for policy reasons.”⁵⁶

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF 14 Op. Off. Legal Counsel 37, 1990 WL 488469, *11 (1990)? NOTHING.

There is little case law precedent on this issue. Sometimes, the only person who has standing will not file a lawsuit because he or she benefits from the Presidential dispensation. Still, there are a few cases. In, *Kendall v. United States*,⁵⁷ the Postmaster General refused to

⁵⁴ The Attorney Gen.'s Duty to Defend & Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 59-60, 1980 WL 20999, *4 (1980) (emphasis added).

⁵⁵ *The Attorney General's Duty to Defend & Enforce Constitutionally Objectionable Legislation*, 4A U.S. Op. Off. Legal Counsel 55, 57, 1980 WL 20999, *3 (1980).

⁵⁶ Issues Raised by Section 102(c)(2) of H.R.3792, 14 Op. Off. Legal Counsel 37, 1990 WL 488469, *11 (1990):

“Finally, we emphasize that this conclusion *does not permit the President to determine as a matter of policy discretion which statutes to enforce*. The only conclusion here is that he may refuse to enforce a law which he believes is unconstitutional. Obviously, the argument that the President's obligation to defend the Constitution authorizes him to refuse to enforce an unconstitutional statute does not authorize the President to refuse to enforce a statute he opposes for policy reasons.” (Emphasis added.)

⁵⁷ *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 9 L.Ed. 1181 (1838).

comply with a statute that ordered him to pay two contractors for mail carrying services. The Court rejected that argument, and explained, “To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”⁵⁸

**WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Kendall v. United States*?
NOTHING.**

In another OLC Opinion, *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 U.S. Op. Off. Legal Counsel 208, 1995 WL 917140, *11 (O.L.C. 1995), the OLC said: “The Supreme Court and the Attorneys General have long interpreted the Take Care Clause as standing for the proposition that *the President has no inherent constitutional authority to suspend the enforcement of the laws, particularly of statutes.*” (Emphasis added.)

**WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF 19 U.S. Op. Off. Legal
Counsel 208, 1995 WL 917140? NOTHING.**

When President Nixon refused to spend funds that Congress *ordered* him to spend, the Court, in *Train v. New York*,⁵⁹ held (without any dissent) that the President must follow the federal statute, not his policy preferences.⁶⁰

⁵⁸ 37 U.S. (12 Pet.) 524, 613.

⁵⁹ *Train v. New York*, 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975).

⁶⁰ See, Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to the Honorable Edward L. Morgan, Deputy Counsel to the President, Re: Presidential Authority To Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969), reprinted in, *Executive Impoundment of Appropriated Funds: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 92d Cong. 279-91 (1971). The future Chief Justice said:

“It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them.” Reprinted in *Impoundment Hearings* at 279, 283.

**WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Train v. New York*?
NOTHING.**

On the other hand, courts do not have carte blanche to second-guess agency nonenforcement actions. In *Heckler v. Chaney*,⁶¹ the Court held that there is a presumption of unreviewability of decisions of an agency not to undertake an enforcement action. It also held that the plaintiffs did not overcome this presumption. In this case, prison inmates sued to compel the Food and Drug Administration to take enforcement action under the Federal Food, Drug, and Cosmetic Act with respect to drugs used for lethal injections to carry out the death penalty. The Court rejected the inmates' claims. There were no dissents. The OLC Opinion of Nov. 19, 2014, relies on *Heckler v. Chaney* no less than 20 times! This case is the cornerstone and lynch pin of the OLC Opinion. The problem is that the Court wrote it in 1985 and there has been a major shift in the law since then.

For one thing, *Heckler v. Chaney* really focused on standing. As then-Justice Rehnquist said in *Heckler v. Chaney*:⁶²

In addition to these administrative concerns, we note that when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect. Similarly, when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers." [Emphasis in original.]

First, whether or not someone has standing is different from the question whether the President can waive certain provisions of a law for a class of individuals. Standing has nothing to do with the merits. Second, the law of standing has changed considerably since 1985 when the Court decided *Heckler v. Chaney*. The House of Representatives now appears to have standing if the House officially authorizes a lawsuit.⁶³ In addition, any individual charged with enforcing

⁶¹ 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985).

⁶² *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 1656, 84 L. Ed. 2d 714 (1985).

⁶³ *United States v. Windsor*, __U.S.__, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013) holding that the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives had standing to defend DOMA.

the law — whoever gives out the social security cards that the President has now authorized⁶⁴ — should be able to sue to determine if he or she will be disciplined if he or she follows the statute instead of the executive order.

Third parties now have more standing than in the past. Consider *Massachusetts v. E.P.A.*,⁶⁵ which the Court issued in 2007. Various states, local governments, and environmental organizations petitioned for review of an order of the Environmental Protection Agency that denied a petition for rulemaking to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act. The District of Columbia Circuit rejected the petitions but the Supreme Court reversed, saying:

[W]hile the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws.⁶⁶

The Court held that the EPA *could not avoid taking regulatory action* under the Clean Air Act regarding greenhouse gas emissions from new motor vehicles. The EPA argued that, in its expert view, a number of voluntary executive branch programs already provided an effective response to the threat of global warming. Moreover, it had concluded that regulating greenhouse gases might impair the President's ability to negotiate with “key developing nations” to reduce emissions. It also argued that limiting motor-vehicle emissions would reflect an inefficient and piecemeal approach to address the problem of climate change. The majority rejected all those arguments.⁶⁷

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Massachusetts v. E.P.A.*?
NOTHING.

Finally, *Heckler* was very careful to explain that the Agency does not have *carte blanche* to refuse to enforce the law. “We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has ‘consciously and expressly adopted a general

⁶⁴ Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html> (“they will receive Social Security cards, officials said.”)

⁶⁵ *Massachusetts v. E.P.A.*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).

⁶⁶ *Massachusetts v. E.P.A.*, 549 U.S. 497, 534, 127 S. Ct. 1438, 1463.

⁶⁷ *Massachusetts v. E.P.A.*, 549 U.S. 497, 533-35, 127 S. Ct. 1438, 1462-63.

policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”⁶⁸ At that point, the Court cites and quotes another case, where the court did in fact *require* the agency to enforce the law. *Adams v. Richardson*, 156 U.S.App.D.C. 267, 480 F.2d 1159 (1973) (en banc).

**WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Adams v. Richardson*?
NOTHING.**

In response to *Massachusetts v. EPA*, the EPA promulgated greenhouse-gas emission standards for not only new motor vehicles but also stationary sources. The statute provided that a “major emitting facility” is a stationary source with the potential to emit 250 tons per year of “any air pollutant” (or 100 tons per year for certain types of sources). However, the EPA recognized that requiring permits for all sources with greenhouse-gas emissions above these low statutory thresholds would drastically expand those programs and render them, in the EPA’s word, “unadministrable.” Hence, the EPA purported to “tailor” its programs by providing that sources would not become subject to the law if they emitted less than 100,000 tons per year of greenhouse gases.

In *Utility Air Regulatory Group v. EPA*,⁶⁹ the Court held that EPA lacked authority to “tailor” the Act’s unambiguous numerical thresholds of 100 or 250 tons per year to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers. “Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution’s separation of powers.” The Court added that under “our system of government, Congress makes laws,” while the President executes them. “The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law’s administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice.”⁷⁰

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Utility Air Regulatory Group v. EPA*? NOTHING.

⁶⁸ *Heckler v. Chaney*, 470 U.S. 821, 832 n.4, 105 S. Ct. 1649, 1656 n.4.

⁶⁹ 573 U. S. ___, 134 S.Ct. 2427. 189 L.Ed.2d 372 (2014).

⁷⁰ 573 U. S. ___, ___, 134 S. Ct. 2427, 2446. *See also, Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S. Ct. 941, 956, 151 L. Ed. 2d 908 (2002), which held that the Commissioner of Social Security did not have the authority “to develop new guidelines or to assign liability in a manner inconsistent with the statute.”

In *Barnhart v. Sigmon Coal Co.*, the Court held that that the Commissioner of Social Security did not have the authority “to develop new guidelines or to assign liability in a manner inconsistent with the statute.”⁷¹

WHAT DOES THE Nov. 19, 2014 OLC OPINION SAY OF *Barnhart v. Sigmon Coal Co.*? NOTHING.

CONCLUSION

In the summer of 2013, President Obama announced that he was “suspending” the employer mandate of the Affordable Care Act, popularly called ObamaCare.⁷² He did not explain the source of his asserted power. The Affordable Care Act has no provision giving the President any power to suspend or postpone the mandate. The law requires employers with 50 or more full-time workers to give health-insurance coverage to their employees or pay a penalty. The section titled “Effective Date,” stipulates that this mandate “*shall* apply” after “December 31, 2013.”⁷³ Congress’ use of the word “shall” does not suggest that the President the power to ignore that provision.

The President claim of power to change the date to December 31, 2014, apparently included the power to change the date yet again, along with other provisions of the law. Senator Tom Harkin of Iowa wondered how the President has the authority, unilaterally, to suspend or delay the employer mandate. “This was the law. How can they change the law?” he asked.⁷⁴

That is a very good question and I have no answer to it. The President did not suggest that the law was unconstitutional. Indeed, his Solicitor General successfully defended the

⁷¹ *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, 122 S. Ct. 941, 956, 151 L. Ed. 2d 908 (2002).

⁷² Zachary A. Goldfarb & Sandhya Somashekhar, *White House Delays Health-Care Rule that Businesses Provide Insurance to Workers*, WASHINGTON POST, July 2, 2013.

⁷³ Pub. L. 111-148, Title I, § 1513(d).

⁷⁴ Jonathan Weisman & Robert Pear, *Seeing Opening, House G.O.P. Pushes Delay on Individual Mandate in Health Law*, NEW YORK TIMES, July 10, 2013, at p. A15. Senator Harkin, as the chair of the Senate Health, Education, Labor and Pensions Committee, was an author of the health law.

constitutionality of the law before the Supreme Court.⁷⁵ Can another President waive all of the Affordable Care Act?

In 1998, in *Clinton v. New York*,⁷⁶ the Court held that it was unconstitutional to give the President a line item veto, which Congress could override. The power of the President to suspend or waive a constitutional law when the law itself does not provide for a waiver is much more powerful than a line item because there is no procedure to override a Presidential Decree. Congress can override a veto.

Now, President Obama says that he can change the immigration laws, to “overhaul” them, as the New York Times reported. Yet, earlier, the President offered very different legal advice:

If we start broadening that [his protection to “Dreamers” — people who came to the United States as young children], then essentially *I’ll be ignoring the law in a way that I think would be very difficult to defend legally. So that’s not an option.*⁷⁷

The OLC Opinion has not explained why the President changed his mind. Nor has it explained the rationale behind the President’s considered judgment (22 times he made substantially similar statements for over a year) and why the OLC now thinks that President was so wrong.

One thing we do know is that the President is not acting to fill in some details in a legislative scheme. Nor is the President acting to implement what he in good faith believes is the will of Congress. In contrast, the President has said that he is acting because — in his own words — “Congress has failed.” <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>. Not even the OLC Opinion never even purports to argue that the President can overhaul a statute because he thinks Congress has failed.

⁷⁵ *National Federation of Independent Business v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

⁷⁶ *Clinton v. City of New York*, 524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998).

⁷⁷ Michael D. Shear, *For Obama, Executive Order on Immigration Would Be a Turnabout*, N.Y. TIMES, Nov. 17, 2014, <http://www.nytimes.com/2014/11/18/us/by-using-executive-order-on-immigration-obama-would-reverse-long-held-stance.html> (emphasis added).